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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 KEITH NOWLING,

11 Petitioner,

12 v.

13 UNITED STATES OF AMERICA,

14 Respondent.

Civil No. 15cv0766 JAH

ORDER DISMISSING PETITION
FOR WRIT OF ERROR CORAM
NOBIS PURSUANT TO 28 U.S.C. §
1915(e)(2)(B) AND DENYING
MOTION FOR LEAVE TO
PROCEED *IN FORMA PAUPERIS*
AS MOOT

15 Petitioner Keith Nowling, a prisoner proceeding *pro se*, filed a petition for Writ of
16 Error *Coram Nobis*, pursuant to 28 U.S.C. § 1651 (Petitioner's "Writ"), seeking review of
17 the sentence imposed in case #3:12-cr-01253-JAH-2. See Doc. # 1 at 3. Petitioner
18 additionally filed a Motion for Leave to Proceed *In Forma Pauperis* ("IFP"), pursuant to 28
19 U.S.C. § 1915(a). See Doc. # 2.

20 All parties instituting any civil action, suit or proceeding in a district court of the
21 United States, except an application for writ of *habeas corpus*, must pay a filing fee of \$350.
22 See 28 U.S.C. § 1914(a). An action may proceed despite a petitioner's failure to prepay
23 the entire fee only if the petitioner is granted leave to proceed IFP pursuant to 28 U.S.C.
24 § 1915(a). See Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999).

25 Notwithstanding payment of any filing fee or portion thereof, complaints filed by
26 any person seeking to proceed IFP are subject to a mandatory and *sua sponte* review and
27 dismissal by the court to the extent it is "frivolous, malicious, fails to state a claim upon
28 which relief may be granted, or seeks monetary relief from a defendant immune from such

1 relief.” 28 U.S.C. § 1915(e)(2)(B); Calhoun v. Stahl, 254 F.3d 845, 845 (9th Cir. 2001);
 2 Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

3 Upon review of Petitioner’s Writ, this Court finds that it must be dismissed because
 4 it fails to present a cognizable claim upon which relief may be granted under 28 U.S.C. §
 5 1651. To state a claim for *coram nobis* relief under 28 U.S.C. § 1651, a petitioner must
 6 show that: (1) a more usual remedy is unavailable, (2) valid reasons existed for not
 7 attacking the conviction earlier, (3) adverse consequences exist from the conviction
 8 sufficient to satisfy the case or controversy requirement of Article III, and (4) the error is
 9 of the most fundamental character. See Hirabayashi v. United States, 828 F.2d 591, 604
 10 (9th Cir. 1987). The requirements are conjunctive, such that failure to meet any one of
 11 them is fatal. See Matus-Leva v. United States, 287 F.3d 758, 760 (9th Cir. 2002).

12 In his Writ, Petitioner requests correction of the sentence imposed in case #3:12-cr-
 13 01253-JAH-2. See Doc. # 1 at 9. Specifically, Petitioner contends that seven
 14 misdemeanor convictions were improperly included in his pre-sentence documentation,
 15 resulting in this Court’s consideration of an improper guideline range during sentencing.
 16 Id. at 8. In other words, Petitioner attempts to collaterally attack the same sentence he
 17 currently serves.

18 As plead, Petitioner fails to show that his claim is properly brought pursuant to 28
 19 U.S.C. § 1651. *Coram nobis* relief affords a remedy specifically intended to attack and
 20 redress the “lingering collateral consequences” of unlawful convictions that have already
 21 been “fully served.” See Telnik v. United States, 24 F.3d 42, 45 (9th Cir. 1994). In the
 22 Ninth Circuit, *habeas corpus* relief is the usual remedy for inmates in federal custody
 23 seeking to collaterally attack an allegedly unlawful sentence being served by the inmate.
 24 Id.

25 Petitioner is an inmate in federal custody alleging that the sentence he currently
 26 serves was unlawfully imposed. See Doc. # 1 at 3. Thus, pursuit of the more usual
 27 remedy requires filing a *habeas corpus* petition pursuant to 28 U.S.C. § 2255. See Telnik,
 28 24 F.3d at 45. Petitioner’s vague contention that “[t]he Title 28 U.S.C. [§] 2255, is not

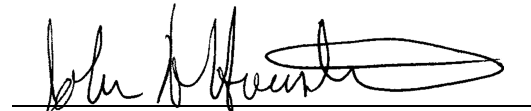
1 available to the petitioner” is insufficient to show that the remedy is unavailable. See Doc.
2 # 1 at 10. Therefore, Petitioner has not met his burden to state a claim entitling him to
3 *coram nobis* relief.

4 Accordingly, this Court finds that Petitioner’s Writ must be dismissed, pursuant
5 to 28 U.S.C. § 1915(e)(2)(B)(ii), because it fails to present a cognizable claim for relief
6 under 28 U.S.C. § 1651.

7 For the foregoing reasons, IT IS HEREBY ORDERED:

- 8 1. Petitioner’s Writ of Error *Coram Nobis* is **DISMISSED without prejudice**;
9 and
- 10 2. Petitioner’s Motion for Leave to Proceed *In Forma Pauperus* is **DENIED as**
11 **moot.**

12 Dated: July 24, 2015



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14 JOHN A. HOUSTON
United States District Judge
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